

MT LEGISLATIVE HISTORY

Chapter 628 1987

Bill (H) 567 S _____

Original bill & hist. ☒ C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Feb 11 ☒ C

Hearing Date(s) Mar 25 ☒ C

Feb 23 ☒ C

Mar 27 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Date Out Feb 23 ☒ C

Mar 27 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

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of Montana

HOUSE BILL NO. 567

INTRODUCED BY RAMIREZ, SPAETH, LORY,
J. BROWN, MERCER

IN THE HOUSE

FEBRUARY 2, 1987 INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

FEBRUARY 23, 1987 COMMITTEE RECOMMEND BILL
DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 24, 1987 PRINTING REPORT.

SECOND READING, DO PASS.

ON MOTION, RULES SUSPENDED AND BILL
PLACED ON THIRD READING THIS DAY.

THIRD READING, PASSED.
AYES, 94; NOES, 6.

TRANSMITTED TO SENATE.

IN THE SENATE

MARCH 2, 1987 INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

MARCH 28, 1987 COMMITTEE RECOMMEND BILL BE
CONCURRED IN AS AMENDED. REPORT
ADOPTED.

MARCH 30, 1987 SECOND READING, CONCURRED IN.

ON MOTION, RULES SUSPENDED TO PLACE
BILL ON THIRD READING THIS DAY.

THIRD READING, CONCURRED IN.
AYES, 50; NOES, 0.

RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

APRIL 8, 1987

RECEIVED FROM SENATE.

SECOND READING, AMENDMENTS NOT
CONCURRED IN.

ON MOTION, FREE CONFERENCE COMMITTEE
REQUESTED AND APPOINTED.

IN THE SENATE

APRIL 9, 1987

ON MOTION, FREE CONFERENCE COMMITTEE
REQUESTED AND APPOINTED.

IN THE HOUSE

APRIL 16, 1987

FREE CONFERENCE COMMITTEE REPORTED.

IN THE SENATE

APRIL 20, 1987

FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

IN THE HOUSE

APRIL 20, 1987

SECOND READING, FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

APRIL 21, 1987

THIRD READING, FREE CONFERENCE
COMMITTEE REPORT ADOPTED.

SENT TO ENROLLING.

1
2 INTRODUCED BY *House* BILL NO. *567*
3 *Ramirez Specth Lox J. Brown*
4 *MERCER*

5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT IN AN
6 ACTION ARISING FROM BODILY INJURY OR DEATH, PLAINTIFF'S
7 REIMBURSEMENT FROM A COLLATERAL SOURCE IS ADMISSIBLE IN
8 EVIDENCE AND THAT UNLESS THE SOURCE OF THE REIMBURSEMENT HAS
9 A SUBROGATION RIGHT UNDER STATE OR FEDERAL LAW, AN AWARD TO
10 PLAINTIFF MUST BE REDUCED BY THE AMOUNT OF THE
11 REIMBURSEMENT; PROVIDING THAT UNLESS A SUBROGATION RIGHT IS
12 SPECIFICALLY GRANTED BY STATE OR FEDERAL LAW, THERE IS NO
13 SUBROGATION RIGHT REGARDING AN AMOUNT PAID OR PAYABLE IF AN
14 AWARD IS REDUCED BY THAT AMOUNT; AND PROVIDING AN
15 APPLICABILITY DATE."

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

17 Section 1. Definitions. As used in (sections 1 and 2):

18 (1) "Collateral source" means a payment for something
19 that is later included in a tort award and which is made to
20 or for the benefit of a plaintiff or is otherwise available
21 to the plaintiff:

22 (a) for medical expenses and disability payments under
23 the federal Social Security Act, any federal, state, or
24 local income disability act, or any other public program;

25 (b) under any health, sickness, or income disability

1 insurance or automobile accident insurance that provides
2 health benefits or income disability coverage, and any other
3 similar insurance benefits available to the plaintiff,
4 except life insurance;

5 (c) under any contract or agreement of any person,
6 group, organization, partnership, or corporation to provide,
7 pay for, or reimburse the costs of hospital, medical,
8 dental, or other health care services, except gifts or
9 gratuitous contributions or assistance;

10 (d) any contractual or voluntary wage continuation
11 plan provided by an employer, or other system intended to
12 provide wages during a period of disability; and

13 (e) any other source, except the assets of the
14 plaintiff or of his immediate family if he is obligated to
15 repay a member of his immediate family.

16 (2) "Person" includes individuals, corporations,
17 associations, societies, firms, partnerships, joint stock
18 companies, government entities, political subdivisions, and
19 any other entity or aggregate of individuals.

20 (3) (a) "Plaintiff" means a person who alleges that he
21 sustained bodily injury, or on whose behalf recovery for
22 bodily injury or death is sought, or who would have a
23 beneficial, legal, or equitable interest in a recovery.

24 (b) The term includes:

25 (i) a legal representative;

1 (ii) a person with a wrongful death or surviving cause
2 of action;

3 (iii) a person seeking recovery on a claim for loss of
4 consortium, society, assistance, companionship, or services;
5 and

6 (iv) any other person whose right of recovery or whose
7 claim or status is derivative of one who has sustained
8 bodily injury or death.

9 Section 2. Collateral source reductions in actions
10 arising from bodily injury or death -- subrogation rights.

11 (1) In an action arising from bodily injury or death,
12 evidence is admissible to show that plaintiff has been or
13 may be reimbursed from a collateral source for an element of
14 damages and, except as otherwise provided in this section,
15 the trier of fact must reduce the award by the amount found
16 paid or payable. The damages must be found and reduced by
17 special verdict, or by special findings if trial is not by
18 jury. If the trier of fact finds by a preponderance of the
19 evidence that plaintiff is likely to receive future
20 collateral source benefits, the special verdict or findings
21 must reduce any future damages, as well as damages already
22 incurred, by the amount of the future collateral source
23 benefits.

24 (2) Amounts paid or payable to a plaintiff from a
25 collateral source that has a subrogation right under state

1 or federal law are admissible in evidence but may not be
2 used to reduce an award.

3 (3) Except for subrogation rights specifically granted
4 by state or federal law, there is no right to subrogation
5 for any amount paid or payable to a plaintiff from a
6 collateral source if an award is reduced by that amount
7 under subsection (1).

8 (4) Before an insurance policy payment is used to
9 reduce an award under subsection (1), the amount plaintiff
10 paid or is obligated to pay to keep the policy in force for
11 the policy period during which the insurance policy payment
12 was made must be deducted from the amount of the insurance
13 policy payment.

14 Section 3. Applicability. This act applies only to
15 causes of action arising after the effective date of this
16 act.

-End-

HOUSE BILL NO. 567

INTRODUCED BY RAMIREZ, SPAETH, LORY,

J. BROWN, MERCER

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT--IN--AN ACTION--ARISING--FROM--BODILY--INJURY--OR--DEATH--PLAINTIFF'S REIMBURSEMENT--FROM--A--COLLATERAL--SOURCE--IS--ADMISSIBLE--IN EVIDENCE--AND--THAT--UNLESS--THE--SOURCE--OF--THE--REIMBURSEMENT--HAS A--SUBROGATION--RIGHT--UNDER--STATE--OR--FEDERAL--LAW--AN--AWARD--TO PLAINTIFF--MUST MAY BE--REDUCED--BY--THE--AMOUNT--OF--THE REIMBURSEMENT--PROVIDING--THAT--UNLESS--A--SUBROGATION--RIGHT--IS SPECIFICALLY--GRANTED--BY--STATE--OR--FEDERAL--LAW--THERE--IS--NO SUBROGATION--RIGHT--REGARDING--AN--AMOUNT--PAID--OR--PAYABLE--IF--AN AWARD--IS--REDUCED--BY--THAT--AMOUNT; PROVIDING--THAT--EVIDENCE--OF INSURANCE--DEPENDANT--MAY--HAVE--AND--EVIDENCE--OF--PLAINTIFF'S--AND DEPENDANT'S--LITIGATION--COSTS--AND--ATTORNEY--FEES--ARE ADMISSIBLE--AMENDING--SECTION--33-23-102--MCA, FOR THE REDUCTION OF JURY AWARDS BY THE TRIAL COURT FOR AMOUNTS PAID OR PAYABLE FROM COLLATERAL SOURCES AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Definitions. As used in [sections 1 and 2]:

(1) "Collateral source" means a payment for something that is later included in a tort award and which is made to

or for the benefit of a plaintiff or is otherwise available to the plaintiff:

(a) for medical expenses and disability payments under the federal Social Security Act, any federal, state, or local income disability act, or any other public program;

(b) under any health, sickness, or income disability insurance or automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits available to the plaintiff, except life insurance;

(c) under any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except gifts or gratuitous contributions or assistance;

(d) any contractual or voluntary wage continuation plan provided by an employer, or other system intended to provide wages during a period of disability; and

(e) any other source, except the assets of the plaintiff or of his immediate family if he is obligated to repay a member of his immediate family.

(2) "Person" includes individuals, corporations, associations, societies, firms, partnerships, joint stock companies, government entities, political subdivisions, and any other entity or aggregate of individuals.

1 (3) (a) "Plaintiff" means a person who alleges that he
2 sustained bodily injury, or on whose behalf recovery for
3 bodily injury or death is sought, or who would have a
4 beneficial, legal, or equitable interest in a recovery.

5 (b) The term includes:

6 (i) a legal representative;

7 (ii) a person with a wrongful death or surviving cause
8 of action;

9 (iii) a person seeking recovery on a claim for loss of
10 consortium, society, assistance, companionship, or services;
11 and

12 (iv) any other person whose right of recovery or whose
13 claim or status is derivative of one who has sustained
14 bodily injury or death.

15 Section 2, Collateral source reductions in actions
16 arising from bodily injury or death, subrogation rights,
17 (1) in an action arising from bodily injury or death,
18 evidence is admissible to show that plaintiff has been or
19 may be reimbursed from a collateral source for an element of
20 damages and, except as otherwise provided in this section,
21 the trier of fact must MAY reduce the award by the amount
22 found paid or payable. The damages must be found and reduced
23 by special verdict, or by special findings if trial is not
24 by jury, if the trier of fact finds by a preponderance of
25 the evidence that plaintiff is likely to receive future

1 collateral source benefits, the special verdict or findings
2 must reduce any future damages, as well as damages already
3 incurred, by the amount of the future collateral source
4 benefits.

5 (2) Amounts paid or payable to a plaintiff from a
6 collateral source that has a subrogation right under state
7 or federal law are admissible in evidence but may not be
8 used to reduce an award.

9 (3) Except for subrogation rights specifically granted
10 by state or federal law, there is no right to subrogation
11 for any amount paid or payable to a plaintiff from a
12 collateral source if an award is reduced by that amount
13 under subsection (1).

14 (4) Before an insurance policy payment is used to
15 reduce an award under subsection (1), the amount plaintiff
16 paid or is obligated to pay to keep the policy in force for
17 the policy period during which the insurance policy payment
18 was made must be deducted from the amount of the insurance
19 policy payment.

20 (5) EVIDENCE OF THE FOLLOWING IS ADMISSIBLE IN AN
21 ACTION ARISING FROM BODILY INJURY OR DEATH:

22 (A) INSURANCE, INCLUDING LIABILITY DOLLAR LIMITS, THAT
23 IS AVAILABLE TO DEFENDANT TO PAY FOR A JUDGMENT AGAINST
24 DEFENDANT, AND

25 (B) PLAINTIFF'S AND DEFENDANT'S CURRENT AND EXPECTED

1 FUTURE LITIGATION COSTS AND ATTORNEY FEES.

2 SECTION 3. -- SECTION 33-23-102, MCA, IS AMENDED TO READ:
 3 "33-23-102. -- Existence of insurance not to be made
 4 evident --- exception --- No Except as provided in -- (section
 5 2(5)) -- no attempt may be made in the trial of an action
 6 brought against a political subdivision of the state,
 7 municipality, or any public body, corporation, commission,
 8 board, agency, organization, or other public entity to
 9 suggest the existence of any insurance which covers in whole
 10 or in part any judgment or award which may be rendered in
 11 favor of plaintiff."

12 SECTION 2. COLLATERAL SOURCE REDUCTIONS IN ACTIONS
 13 ARISING FROM BODILY INJURY OR DEATH -- SUBROGATION RIGHTS.
 14 (1) IN AN ACTION ARISING FROM BODILY INJURY OR DEATH WHEN
 15 THE TOTAL AWARD AGAINST ALL DEFENDANTS IS IN EXCESS OF
 16 \$100,000 \$50,000 AND THE PLAINTIFF WILL BE FULLY COMPENSATED
 17 FOR HIS DAMAGES, EXCLUSIVE OF COURT COSTS AND ATTORNEY FEES,
 18 A PLAINTIFF'S RECOVERY MUST BE REDUCED BY ANY AMOUNT PAID OR
 19 PAYABLE FROM A COLLATERAL SOURCE THAT DOES NOT HAVE A
 20 SUBROGATION RIGHT.

21 (2) BEFORE AN INSURANCE POLICY PAYMENT IS USED TO
 22 REDUCE AN AWARD UNDER SUBSECTION (1), THE FOLLOWING AMOUNTS
 23 MUST BE DEDUCTED FROM THE AMOUNT OF THE INSURANCE POLICY
 24 PAYMENT:

25 (A) THE AMOUNT THE PLAINTIFF PAID FOR THE 5 YEARS

1 PRIOR TO THE DATE OF INJURY;

2 (B) THE AMOUNT THE PLAINTIFF PAID FROM DATE OF INJURY
 3 TO DATE OF JUDGMENT; AND

4 (C) THE PRESENT VALUE OF THE AMOUNT THE PLAINTIFF IS
 5 THEREAFTER OBLIGATED TO PAY TO KEEP THE POLICY IN FORCE MUST
 6 BE DEDUCTED FROM THE AMOUNT OF THE INSURANCE POLICY PAYMENT
 7 FOR THE PERIOD FOR WHICH ANY REDUCTION OF AN AWARD IS MADE
 8 PURSUANT TO SUBSECTION (3).

9 (3) THE JURY SHALL DETERMINE ITS AWARD WITHOUT
 10 CONSIDERATION OF ANY COLLATERAL SOURCES. AFTER THE JURY
 11 DETERMINES ITS AWARD, REDUCTION OF THE AWARD MUST BE MADE BY
 12 THE TRIAL JUDGE AT A HEARING AND UPON A SEPARATE SUBMISSION
 13 OF EVIDENCE RELEVANT TO THE EXISTENCE AND AMOUNT OF
 14 COLLATERAL SOURCES. EVIDENCE IS ADMISSIBLE AT THE HEARING TO
 15 SHOW THAT THE PLAINTIFF HAS BEEN OR MAY BE REIMBURSED FROM A
 16 COLLATERAL SOURCE THAT DOES NOT HAVE A SUBROGATION RIGHT. IF
 17 THE TRIAL JUDGE FINDS THAT, AT THE TIME OF HEARING, IT IS
 18 NOT REASONABLY DETERMINABLE WHETHER OR IN WHAT AMOUNT A
 19 BENEFIT FROM SUCH A COLLATERAL SOURCE WILL BE PAYABLE, HE
 20 SHALL:

21 (A) ORDER ANY PERSON AGAINST WHOM AN AWARD WAS
 22 RENDERED AND WHO CLAIMS A DEDUCTION UNDER THIS SECTION TO
 23 MAKE A DEPOSIT INTO COURT OF THE DISPUTED AMOUNT, AT
 24 INTEREST; AND

25 (B) REDUCE THE AWARD BY THE AMOUNT DEPOSITED. THE

1 AMOUNT DEPOSITED AND ANY INTEREST THEREON ARE SUBJECT TO THE
2 FURTHER ORDER OF THE COURT, PURSUANT TO THE REQUIREMENTS OF
3 THIS SECTION.

4 (4) EXCEPT FOR SUBROGATION RIGHTS SPECIFICALLY GRANTED
5 BY STATE OR FEDERAL LAW, THERE IS NO RIGHT TO SUBROGATION
6 FOR ANY AMOUNT PAID OR PAYABLE TO A PLAINTIFF FROM A
7 COLLATERAL SOURCE IF AN AWARD IS REDUCED BY THAT AMOUNT
8 UNDER SUBSECTION (1).

9 Section 3. Applicability. This act applies only to
10 causes of action arising after the effective date of this
11 act.

-End-

JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION

1987

Committee Members

District

Rep. Earl Lory, Chairman	59
Rep. John Mercer, Vice Chairman	50
Rep. Kelly Addy	94
Rep. Dave Brown	72
Rep. Tom Bulger	37
Rep. John Cobb	42
Rep. Fritz Daily	69
Rep. Paula Darko.	2
Rep. Ralph Eudaily	60
Rep. Leo Giacometto	24
Rep. Bud Gould	61
Rep. Ed Grady	47
Rep. Tom Hannah	86
Rep. Vernon Keller	83
Rep. Al Meyers	53
Rep. Joan Miles	45
Rep. Paul Rapp-Svrcek	51
Rep. Bill Strizich	41

Secretary

Renee Podell

Staff

John McMaster

STATUS SHEET

50th LEGISLATIVE SESSION

JUDICIARY

COMMITTEE

HOUSE BILL NUMBER	ENTERED COM. DATE	DATE CON- SIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CON- CURRED IN DATE	BE NOT CON- CURRED IN DATE	BE CON- CURRED IN AMENDED DATE	BE NO CONCUR IN A AMEND DATE
495	2/11/87	2/14/87	tabled								
501	2/13/87	2/14/87			2/14/87	2/14/87					
502	2/16/87	2/17/87	2/18/87	tabled							
503		2/9/87	2/17/87	2/17/87							
509		2/16/87	2/16/87			2/16/87					
514		2/10/87	2/20/87	tabled							
522		2/9/87	2/23/87	tabled							
546		2/16/87	2/20/87			2/20/87					
548		2/16/87	2/23/87	tabled							
554		2/10/87	2/10/87	2/10/87							
558		2/13/87	2/16/87			2/16/87					
564		2/11/87	2/20/87			2/20/87					
566		2/12/87	2/21/87			2/21/87					
567		2/11/87				2/23/87					

with insurance consumer money. He strongly urged a do not pass on this bill.

BONNIE TIPPY, Alliance American Insurers, went on record as being in very strong opposition of this bill.

RANDY BISHOP, Attorney, Billings, stated he was speaking on behalf of the Montana Association of Defense Counsel, and hoped HB 672 would be rejected.

SUE WEINGARTNER, Montana Association of Defense Counsel, Helena, speaking on behalf of Montana Liability Coalition, stated they strongly oppose the bill.

TOM KEEGAN, Attorney, Helena, Member of the Trial Lawyers Association, opposed this bill. The Supreme Court has said the introduction of insurance has no business in the courtroom in front of the jury.

There were no further opponents and no questions from the committee.

Rep. Whalen closed the hearing on HB 672 by stating this would not be a defense lawyer relief act.

HOUSE BILL NO. 567: Rep. Ramirez, District No. 87, sponsor, stated this bill is very important in regard to tort reform. The bill provides that in an action arising from bodily injury or death, plaintiff's reimbursement from a collateral source is admissible as evidence unless the source of the reimbursement has a subrogation right under state or federal law. He pointed out there are jury verdicts that are either excessive or do not make sense sometimes because they are trying a play, a fantasy. They are not trying the true facts in the case with respect to damages because of the collateral source rule. It simply says, those collateral sources would be given to the jury and the jury would then be required to make a reduction unless there is a statutory subrogation right. They must have a system where society pays once and only once for these damages.

PROPOSERS: GERALD J. NEELEY. Montana Medical Association, Billings, stated in Montana, the collateral source rule provides "that a payment to (an injured victim) from a source wholly independent of and not in behalf of the wrongdoer, cannot inure to the benefit of the wrongdoer to lessen the damages recoverable from him, and the evidence of such payment is inadmissible. Goggans vs. Winkley, 159 Mont. 85, 92, 485 P.2d 594, 598 (1972). The rule is predicated upon the general notion that the wrongdoer should not benefit because a victim has been prudent enough to buy his/her own insurance or because if he/she is fortunate

enough to have friends or relatives who are willing to provide valuable services without pay during a time of need. The rule is now under attack. The general argument advanced is that the rule allows the victim to be paid twice for damages such as medical expenses covered by insurance and thus, provides the injured party with a "windfall". He further stated that the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. Abolishing the rule would only create a "windfall" for insurance companies that have received premiums, but will be able to escape risks they have insured for. The collateral source rule should be modified and not eliminated. He submitted written testimony and amendments to this bill. (Exhibit A). He also submitted a handout titled, Actuarial Analysis of American Medical Association Tort Reform Proposals, dated September, 1985. (Exhibit B). He stated the Montana Liability Coalition is in strong support of the legislation.

CONNIE CLARK, Vice-Chairman, Montana Forward Coalition, stated there is a need for a modification or elimination of the collateral source rule. This is a positive step towards correcting a flaw in the legal system and it should help improve the business climate in the State of Montana. She urged support for the bill.

KAY FOSTER, Billings Area Chamber of Commerce, pointed out that it is the concern of the Chamber that the collateral source rule does drive up the cost of insurance for all Montanans and can lead to dual recovery for the same injury. She submitted written testimony. (Exhibit C).

RALPH YAEGER, Department of Commerce, spoke in behalf of the Governor's Council and stated the Council believed this modification would allow judges and juries to make informed decisions regarding the reimbursement of providers of prior or future compensation. They believe HB 567 will help to eliminate many of the problems associated with the collateral source rule.

OPPONENTS: ERIC THUESEN, Trial Lawyers Association, stated the Trial Lawyers are against double recoveries or windfall for any plaintiff in any lawsuit. He pointed out they are for fair compensation to the victim, decided by a jury of their peers. They do oppose this legislation. Victims are not receiving windfalls. 99% of the cases of victims that use the judicial system, by no means, receives a windfall or double recovery. In 99% of the cases, the victim is never fully compensated for all his losses. He gave the example in chart form of a \$100,000.00 verdict of lawful damages. Litigation costs are not part of the recovery. Under current law, if the verdict was \$100,000.00, litigation

costs might cost \$40,000.00, and if the person was prudent and had insurance to cover \$20,000.00, his net recovery would be about \$80,000.00. Under the proposed bill the man would receive about \$60,000.00. This bill bogs people down in collateral source and victimizes the victim.

TOM KEEGAN, Attorney, Helena, pointed out there is no reason for this bill and it is wrong. He strongly opposed the legislation.

REP. WHALEN explained he has never seen a case where an injured plaintiff has been made whole by the present system. If the collateral source rule is taken away, it will make it that much more difficult for an injured plaintiff to be made whole. He opposed the bill.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 567: Rep. Addy said as a compromise, how about if they deduct from the award all of the benefits received and then add back in all the premiums paid. He asked Rep. Ramirez to comment on that. He stated you can look at how much of the premiums you want to put back in which he would leave at the judgment of the committee. He said he started with one year but five years or more could be added in. Rep. Mercer said he was concerned about people who want to sell insurance and people who want to buy insurance in the area of full compensation. He asked Rep. Ramirez why the rule should not be that an insurance policy could address this issue, such as, it could be treated as a collateral source. Rep. Ramirez stated it is a matter of public policy. Rep. Mercer asked if there would be any market for litigation insurance and Rep. Ramirez said that you can insure for litigation costs. Rep. Mercer said people are not recovering 100% because of the litigation costs. That is a separate issue, Rep. Ramirez stated.

Rep. Ramirez closed the hearing on HB 567 stating that he has confidence in the jury system and as long as we have the jury system, the facts must be given to them.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 12:46 p.m.



EARL LORY, Chairman

DAILY ROLL CALL
JUDICIARY

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 11, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)		✓	✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)			
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

A

J-11-87

- 567

AN EVALUATION OF PROPOSALS TO ELIMINATE
THE COLLATERAL SOURCE RULE

Prepared by the Montana Trial Lawyers Association

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2-11-87
567

(4) Moreover presenting collateral source evidence to juries will distract from the major issues and will create confusion for the juries. Thus, it will waste court resources and will jeopardize the victim's opportunity to obtain a fair trial.

Each of these points are discussed in detail below.

II. DISCUSSION

A. THE VICTIM IS NOT FULLY COMPENSATED UNDER THE CURRENT SYSTEM.

First, the victim rarely receives "double recovery" for his losses because the expenses of modern litigation far exceed anything he can recover through the collateral source rule. Expert medical testimony, for instance, often costs thousands of dollars. Indeed, physicians who charge only \$25 to their patients for an office visit, often charges the same patient \$250 or even \$500 per hour if they have to assist them in litigation. Some physicians have, in fact, charged their patients over \$700 per hour for testimony related to their injuries. Nonmedical expert testimony is just as expensive. Other litigation costs and attorney fees leave the victim with a net recovery of approximately 60% or less of his overall damages, since none of these expenses are recoverable under current laws. The value of the victim's compensation is further diminished because the wrongdoer or his insurance company is not required to pay any interest on the amount owed between the time of the injury and the date of entry of judgment, a period which usually exceeds two years and sometimes exceeds a half a decade.

The amount the victim recovers through the application of the collateral source rule is far less than his overall litigation expenses in virtually every case. This, as a practi-

cal matter, eliminates any opportunity for the victim to be compensated twice and thus, to obtain a "windfall" or "double recovery" as you are now being told.

On the other hand, the collateral source rule serves as a practical device for the injured party to recoup, at least, part of his non-compensable litigation costs and interest. This, of course, furthers the public policy that all injured persons should be fully compensated under the law.

B. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL ONLY FURTHER VICTIMIZE THE INJURED PARTY.

As shown above, in virtually every instance, litigation costs exceed any benefit derived from the collateral source rule. If the rule were eliminated, the victim would receive an even smaller percentage of his overall lawful damages than he is receiving at the current time. Thus, elimination of the rule does more harm than it does good.

C. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL CREATE A "WINDFALL" FOR THE INSURANCE INDUSTRY.

As stated above, the collateral source rule benefits those that are prudent enough to purchase their own insurance. This insurance, of course, does not come free. The insured person pays a premium for it. The insurance company takes money from this person to undertake the risk that there is going to be an injury. When the injury occurs, all the insurance company is doing is paying for the risk it has underwritten. In other words, it is simply fulfilling its contract. The collateral source rule allows the victim to, in effect, recover some of the

premium he or she has paid over the years to be covered for these risks. In that sense, the victim does not receive any "windfall" at all. He is simply getting what he paid and bargained for.

The party that receives the windfall is the insurance company that has received premiums from the negligent party. It gets to keep the premiums the negligent party has paid to it, but does not have to pay for the risk caused by the negligent party's actions. Certainly, this is unfair to both the victim and to the negligent party, who have paid premiums to be covered for these risks.

D. PRESENTING COLLATERAL SOURCE EVIDENCE TO THE JURY..

There are still other problems. Those that advocate eliminating the collateral source rule also want the jury to be presented with evidence concerning who made collateral payments, how much was paid, when they were paid, whether or not they will continue to be paid in the future, and so on. The purported objective of such evidence is to allow the jury to offset the total amount of damages by the amounts expected to be paid by collateral sources.

If the jury is going to be allowed to hear this evidence, however, should not it also be allowed to hear evidence concerning how much the victim has previously paid out in premiums in order to be compensated with collateral insurance benefits? Should not it also be allowed to know that between the time of the injury and the time of judgment, the victim receives no interest on the amounts due to him in compensation? Moreover, shouldn't the jury be allowed to know that litigation costs,

including expert witness fees, many deposition and investigative costs, and attorney fees will not be paid by the wrongdoer, but will have to be paid out of the verdict? In other words, if we are going to allow a jury to reduce the verdict by considering collateral benefits, shouldn't we also allow it to increase the verdict by considering all of the expenses that reduce the net recovery?

The current collateral source rule, which prohibits a jury from considering evidence of collateral sources of payment is predicated partially on the notion that "collateral matters involving transactions between others" only confuse the issues, wastes the jury's and court's time, and leads to consideration of matters which are no business to the wrongdoer or his insurance company. See Goggans, supra. This underpinning of the rule is probably more applicable now than it was in the past. If our aim is to streamline our judicial system in terms of both time and money and also to further the public policy of just compensation for injuries, then we should resist any attempts to make drastic changes in the current rule.

III. SUMMARY AND SUGGESTED SOLUTION

In summary, the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. In the vast majority of the cases, however, collateral benefits do not even approach overall costs, and thus, their elimination would only compound the problem of incomplete compensation. Moreover, abolishing the rule would only create a "windfall" for insurance companies that have received premiums,

but will be able to escape risks they have insured for. Furthermore, presentation of collateral source evidence to a jury without consideration of expenses that reduce the net amount the victim will recover would be unfair. It would also confuse the major issues the jury must decide and cause unnecessary drains on the court's resources.

Thus, at best the collateral source rule should be modified and not eliminated. If it is to be changed, it should accomplish only the following:

(1) Apply only in those rare situations where the victim really does receive a "double recovery" (i.e. where collateral sources exceed litigation expenses).

(2) Require the negligent party's attorney to petition the court for a reduction in the verdict or settlement if a "double recovery" is expected. In this way, judicial resources and moneys are not wasted in the vast majority of cases where "double recovery" does not occur.

(3) Let the Court--not a jury--decide what the appropriate setoff should be. To do otherwise is, again, a tremendous waste of time and money. The confusion and complexity it will generate will also jeopardize the ability to get a fair trial.

A proposed amendment, tailored to achieve these fair objectives, is attached.

SENATE A
DATE 2-11-87
HB 567

1 _____ BILL NO. _____

2 INTRODUCED BY _____

3 BY REQUEST OF THE

4

5 A BILL FOR AN ACT ENTITLED: "PREVENTION OF DOUBLE RECOV-
6 ERY".

7

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9 Section 1. A new section should be enacted to
10 read:

11 Declaration of policy. It is the policy of this
12 state that all persons injured through the fault of another
13 should receive full compensation for all injuries defined
14 under the law and that the wrongdoer should not benefit at
15 the victim's expense. It is also the public policy of this
16 state that a person should not receive more than his just
17 and lawful compensation, after consideration of costs and
18 expenses incurred to recover lawful damages. This Act is
19 designed to promote these policies.

20 Section 2. A new section should be enacted to
21 read:

22 Definitions. The following words, as used in this
23 Act, shall have the meaning set forth below, unless the
24 context clearly requires otherwise:

25 (a) "Claimant" means any person who brings a

1 personal injury action. When the action is brought on
2 another's behalf, the term "claimant" includes a guardian,
3 parent, personal representative, or whoever is acting in the
4 representative capacity of the injured party.

5 (b) "Collateral sources" are sources of compensa-
6 tion paid or given to the claimant for damages by someone
7 other than the wrongdoer.

8 (c) "Litigation costs" mean all reasonable and
9 necessary costs and expenses incurred by a claimant to
10 recover lawful damages, including but not limited to,
11 witness fees, investigation costs, expert fees, attorney
12 fees and similar litigation expenses. Litigation costs
13 include such expenses regardless of whether or not the
14 claimant is compensated by settlement or judgment or before
15 suit is filed in a court of law.

16 (d) "Payments" refer to economic losses paid or
17 payable by collateral sources for wage loss, medical costs,
18 rehabilitation costs, services, and other out-of-pocket
19 costs incurred by or on behalf of a claimant for which that
20 party is claiming recovery through a tort suit.

21 (e) "Wrongdoer" means a person or party legally
22 responsible for damages sustained by a claimant.

23 Section 3. A new section should be enacted to
24 read:

25 Collateral Source Rule. (1) Payments to the

1 claimant from a collateral source cannot inure to the
2 benefit of a wrongdoer to lessen the damages recoverable
3 from him. This collateral source rule shall be applied in
4 all cases where litigation expenses exceed such payments,
5 and thus, net recovery by the claimant is less than his
6 overall lawful damages.

7 (2) The collateral source rule is inapplicable
8 only to the extent that payments exceed litigation expenses,
9 and thus, to apply it would create a net recovery for the
10 claimant beyond his lawful damages.

11 (3) When a wrongdoer alleges that the collateral
12 source rule should not be applied because payments exceed
13 litigation costs, he may petition the district court having
14 proper venue and jurisdiction over the controversy to
15 convene an evidentiary hearing to determine the reasonable
16 value of litigation costs and collateral payments. If the
17 district court determines that collateral payments exceed
18 litigation costs, it shall order that any excess collateral
19 payments be deducted from the lawful damages recovered by
20 the claimant through settlement or judgment.

21 (f) Any motion or petition by the wrongdoer under
22 subparagraph (3) above, shall be made within 30 days in
23 cases of settlement between the parties or within the time
24 provided for requesting a new trial under Montana Rule of
25 Civil Procedure 59(b) in the cases of a judgment.

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1 Section 4. A new section to read:

2 Collateral payments shall not be introduced as
3 evidence. The payment to the victim from collateral sources
4 shall not be admissible as evidence at a trial to determine
5 lawful damages, but shall be determined and applied under
6 the rules set forth in this Act.

7 -End-

B
2-11-87
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Actuarial Analysis of
American Medical Association
Tort Reform Proposals

September, 1985

MILLIMAN & ROBERTSON, INC.
CONSULTING ACTUARIES

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September 11, 1985

Mr. Kirk Johnson
General Counsel
American Medical Association
535 North Dearborn
Chicago, Illinois

Dear Mr. Johnson:

We have completed our review of the potential medical professional liability cost savings related to the American Medical Association (AMA) proposed National Professional Liability Reform Act of 1985 (the Bill). This report describes our approach, our conclusions and a number of important limitations related to this type of analysis.

APPROACH

The objectives of this project were as follows:

1. To identify the potential one-time savings in medical professional liability cost attributable to the four tort reforms in the Bill. (We did not attempt to assign a value to the peer review, discipline and risk management aspects of the Bill.)
2. To identify the potential reductions in medical professional liability claim severity trend rates attributable to the Bill.

Our approach to achieving this objective included the following steps:

1. Estimate the medical professional liability premium (including self-insured costs) in the United States in 1984.
2. Estimate a range of potential savings for each of the four tort reforms in the Bill separately and combined. The bill language we evaluated is included in Appendix A.

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3. Estimate the potential impact on claim severity trend rates of the reforms in the Bill.

SUMMARY OF CONCLUSIONS

The next three sections describe the results from each of the three areas.

Estimated Premium

Table 1 below summarizes the result of our review of medical professional liability costs in the United States in 1984. Appendix B describes the sources of these estimates.

Table 1

Estimated Medical Professional Liability Premium Costs in the United States

<u>Item</u>	<u>Amount in Millions</u>
1. U.S. Direct Written Premium 1984	\$2,258
2. Joint Underwriting Associations (JUA) not included in 1	120
3. Patient compensation funds (PCF), Catastrophe funds (Cat Fund) and other "pay-as-you-go" financial mechanisms	166
4. Hospital self-insurance programs and hospital programs insured outside the United States	<u>200</u>
5. Total	\$2,744

The \$2.7 billion total somewhat underestimates the 1984 cost since we could not identify a source which would permit us to estimate the cost of all governmental self-insurance programs nor the amount of premiums paid directly to non-United States insurers.

Our experience with medical professional liability insurers, JUA's and PCF's indicates that costs have been increasing at more than 15% per year since 1984. By 1986, medical professional liability costs are therefore likely to exceed \$3.6 billion.

Potential Initial Savings

Table 2 below summarizes our estimates of the potential savings for each of the four tort reform components for a typical state.

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Table 2

Potential Initial Savings from Reform Bill

<u>Item</u>	<u>Potential Savings</u> <u>("Typical" State)</u>
Periodic Payments	6%
Collateral Source Offset	8%
Limitation on Non-Economic Damages	12%
Contingency Fee Limitation	9%
Total	28%

Applied to the 1984 medical professional liability costs of \$2.7 billion, the potential initial savings is approximately \$800 million. Applied to the estimated 1986 medical professional liability costs of \$3.6 billion, the potential initial savings is approximately \$1.0 billion.

Appendix C describes the models used to develop these estimates. In addition to the cautions in the LIMITATION section below, the following should be considered:

1. To realize the potential savings it is necessary that law impact claim settlements to the same extent as court awarded claims, even though the statutory language only applies specifically to court awards. In the extreme case, if the law had no effect on settlements the value of the savings when applied only to court awards would be approximately 5%.
2. The savings will vary from state to state based on considerations which are discussed in Appendix C. Application of models to a range of state situations implies that the range of savings within which the experience of most states is likely to fall would be 23% to 33%.
3. The potential initial savings might not be fully reflected in cost reductions immediately after passage of a state law. Insurers and JUA's might be reluctant to decrease rates by the full amount of potential savings until the effectiveness of the law could be tested. PCF's generally charge premiums based on expected claim payments. For several years after passage of state law claim payments will reflect the prior law, and PCF charges will not be immediately affected. Self-insurance costs may be subject to considerations like those of insurers if the self-insurance program is fully funded or like those of PCF if the self-insurance program is not fully funded.

Exhibit B
Date 2-11-87
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If the laws were applicable to claims reported on or after the effective date then it could take three to five years to realize the full initial cost savings. If laws were applicable to claim occurrences on or after the effective date then it would take two to three years longer (five to eight years) to realize the full initial cost savings.

Impact on Trends

The element of the Bill which we anticipate will have a significant effect on claim severity trends is the limitation on non-economic damages. Appendix C describes the manner in which the impact of the law on cost trends has been estimated.

We believe the reduction in trend over the 1986-1989 period for a typical state will approximate 4% per year, with most states realizing a trend savings ranging from 3% to 6%. The trend reduction in the typical state is equivalent to \$80 million per year at 1984 cost levels and \$100 million at 1986 cost levels. The annual savings will continue to increase since rising cost levels will increase the \$2.7 billion base (\$2.0 billion after the law change) and inflation will increase the potential for non-economic loss in excess of \$250,000 per claimant.

LIMITATIONS ON RESULTS

The following limitations should be considered in utilizing these results:

1. The projected potential savings rely on models which depend critically on the judgments which are applied. We believe the judgments are reasonable. Other reasonable judgments could result in significantly different results.
2. The actual savings which might result from passage of these tort reforms will depend on factors such as plaintiff behavior, attorney behavior and court interpretations which cannot be predicted in advance. Actual results may therefore differ significantly on these projections.
3. There are a number of studies underway (the GAO study for example) which are gathering statistical and non-statistical information. If such information were currently available it could significantly affect our judgments and conclusions. As part of this project we are not responsible for updating this report to reflect information which becomes available after the report is issued.

Mr. Kirk Johnson
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4. The Bill is currently in outline form. Actual bill language could produce results which differ from the intended results. We have relied on interpretations from AMA Counsel regarding the intentions of the bill language.

We assume that the agency responsible for administering the Bill would prepare minimum criteria which any state law would need to meet in order to become eligible for the benefits under the Bill. Appendix A comments on some elements which must be included in the actual operation of a state law in order to realize the potential savings.

We appreciate this opportunity to assist the American Medical Association on this important and challenging project.

Sincerely,

Allan Kaufman

Allan Kaufman, F.C.A.S.

AK/dmk

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix A - Tort Reform Proposals

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- (1) Periodic Payments - Such state liability reform shall include provisions:
 - (A) that periodic payments shall be made for all future damages when such damages exceed \$100,000;
 - (B) for mandatory periodic payments of such future damages over the lifetime of the beneficiary or until the damages are fully paid, whichever comes first; and
 - (C) that if a plaintiff dies prior to full payment of damages, the party obligated to make such payment shall retain any sums not yet paid out in accordance with the payment schedule, provided, however, that the court shall have the discretion to order continued payments necessary for the support of the plaintiff's spouse or children.
- (2) Collateral Source Rule - Such state liability reform shall provide:
 - (A) that in an action for damages for medical injury, the damages awarded shall be reduced by amounts paid or to be paid from all collateral sources including:
 - (i) government disability or sickness programs;
 - (ii) government or private health insurance;
 - (iii) employer wage continuation program; and
 - (iv) other sources intended to compensate the plaintiff for such medical injury.
 - (B) that the amount that the judgment is reduced shall equal the difference between the total amounts received from collateral sources and the amount directly paid by the plaintiff to secure such amounts.
- (3) Noneconomic Damages - Such state liability reform shall provide that in a judgment for medical injury not more than \$250,000 may be awarded as damages for noneconomic losses.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix A - Tort Reform Proposals

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- (4) Contingency Fees - Such state liability reform shall provide that the attorney representing a medical injury claimant may not receive as a fee more than 33 1/3% of the first \$150,000 of damages, 25% of the next \$150,000 of damages, and 10% of the balance of any damages awarded to such claimant. The Court awarding a judgment shall be authorized to increase the permissible fee upon a petition containing evidence which in the opinion of the Court justifies additional compensation.

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Analysis of Tort Reform Proposals

Appendix A -- Comments on Interpretation
of Reform Bill for Valuation Purposes

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To realize the potential savings the Bill must be interpreted to accomplish the following:

(1) Periodic Payments:

- a. Claimant's attorney fee should be paid periodically in the same fashion as the award or settlement amount.
- b. The period of payment of future damages is estimated when the award (or settlement) is made. Amounts paid for medical costs and non-economic damages terminate at the earliest of the following two dates: (1) when the claimant dies; or (2) when the originally estimated period of payment for future damages expires.

(2) Collateral Source

- a. Government programs to which an offset applies include the following: medicare, medicaid and public assistance (with respect to services rendered prior to the award or settlement date) social security retirement and disability income, veterans benefits, workers' compensation benefits and benefits to military personnel and their dependents.
- b. Where public or private sources of medical benefits or income replacement coverage now permit the public or private source to place a lien on a professional liability award or permit subrogation against the professional liability tort feaseor, the lien and subrogation rights must be superceded by the revised collateral source rule.
- c. A mechanism must be established to permit the professional liability insurer to offset the claimants future collateral source benefits under programs such as employer sponsored health insurance against amounts of damages awarded for future medical expenses without penalizing the claimant if those benefits are not available at all times in the future. One method to accomplish this objective is to permit the professional liability insurer to issue a health insurance policy which would provide coverage for gaps in benefits awarded by a court or agreed to in a settlement if collateral sources of those benefits are not available in the future.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix A -- Comments on Interpretation
of Reform Bill for Valuation Purposes

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(3) Non-economic Damages

The \$250,000 limit is to apply to each injured patient, no matter how many health care providers are held to be negligent.

(4) Contingency Fees

- a. The contingency fee schedule applies to the amount awarded to the claimant no matter how many health care providers are held to be negligent.
- b. The contingency fee applies to the award or settlement amount after reduction for collateral source offsets.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix B - Sources for Table 1

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1. A.M. Best Company. Covers insurers reporting to A.M. Best. These amounts are gross of reductions for reinsurance which the insurers might purchase.

2. From JUA financial statements as follows

<u>State</u>	<u>Written Premium (Millions)</u>
Florida	4.2
Massachusetts	65.6
New Hampshire	8.0
New York	6.8
Pennsylvania	4.7
Rhode Island	11.5
South Carolina	5.2
Texas	4.0
Wisconsin	10.4
Total	120.4

3. From PCF and CAT Fund financial reports

<u>State</u>	<u>Assessments (Millions)</u>
Florida	55.0
Indiana	9.5
Kansas	15.0
Louisiana	1.0
Nebraska	0.1
New Mexico	0.9
Pennsylvania	66.2
South Carolina	1.0
Wisconsin	17.3
Total	166.0

4. Hospital self-insurance programs:

- a. Hospital professional liability costs constitute approximately 25% of total medical professional liability costs (NAIC Study).
- b. We estimate that 20% to 40% (use 30%) of hospital professional liability costs are self-insured or insured directly through non-United States insurers and thus those costs are not included in items 1 - 3 above.
- c. The total of items 1 - 3 therefore constitutes all but 7.5% of total costs (7.5% is 30% of 25%). The self-insured segment is calculated to increase the total of items 1 - 3 from 92.5% (100% - 7.5%) to 100%.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix C - Description of Models

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A. Limitations on Non-Economic Damages to \$250,000 per Award

1. The distribution of claim size amounts is assumed to follow a log-normal distribution.
 - a. The coefficient of variation of the distribution is assumed to equal 2.5 in all states.
 - b. A variety of average claim size amounts assuming no policy limit were tested.
 - c. For multiple defendant claims the award amounts are assumed to be distributed as the sum of highly correlated log normal distributions, each with the mean and coefficient of variations described in (a) above. (The distribution of the number of defendants is based on the 1974 - 1978 NAIC Study).
2. The non-economic damage component of the award amount is assumed to closely relate to the total award as follows:
 - a. The non-economic damage amount of the unlimited awards is closely correlated to the total award, e.g., a fixed percentage.
 - b. Award amounts for non-economic damages are assumed to equal 54% of the limited award amount at 1974-1978 closed claim cost levels. This percentage varies over time depending on the relationship between award size and typical policy limit.
 - c. Non-economic damage award amounts are assumed to be log normally distributed with a coefficient of variations of 2.5 and a mean equal to a percentage of the total award which depends on the factors described in 2.b.
3. Legal defense costs are assumed to be equal to 25% of indemnity amounts before the limitation. Legal defense costs are assumed to be unchanged by the limitations (the defense costs become a higher percentage of the reduced indemnity costs).
4. The effect of the policy limit on reducing awards and settlements is assumed to reduce non-economic damage amounts to zero before recoveries for economic loss are affected.

AMERICAN MEDICAL ASSOCIATION

Analysis of Tort Reform Proposals

Appendix C - Description of Models

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5. Since there is significant uncertainty in the actual distribution of non-economic damages by size of claim, and there is some evidence that non-economic damage compensation is a larger portion of the total cost on small claims than large claims, the savings indicated by the model described above are reduced by safety factors of 40% to produce the value shown in Table 2.
6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

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E. Limitation on Contingency Fees

1. The claim size distribution model is the same as that described in A.1 above.
2. Claims are assumed to settle such that the plaintiff receives the same unlimited award amount with the revised contingency fee schedule as the plaintiff would have received under the old contingency fee schedule. Specifically this means the following:
 - a. For unlimited claim amounts below the policy limit, the amount paid by the insurer or self-insurer is reduced by an amount equal to the reduction in the contingency fee.
 - b. For unlimited claim amounts exceeding the policy limit by large amounts the plaintiff receives a greater net award (net of contingency fee) but the insurer pays the same amount.
 - c. For unlimited claim amounts between the levels described in 3.a and 3.b above, the insurer pays somewhat less and the plaintiff receives a somewhat greater award net of contingency fee.
3. Legal defense costs are assumed to follow the pattern described in A.3 above.
4. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

Analysis of Tort Reform Proposals

Appendix C - Description of Models

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C. Periodic Payments

1. Jury instructions commonly require the jury to consider future interest income (the time value of money), and inflation and mortality in establishing awards. If juries on the average reached conclusions which correctly considered these factors then passage of a periodic payment law might have no impact indemnity payments.

The Bill provides that periodic payments for medical and non-economic damages will be made for the shorter of the following two time periods: (1) life expectancy as determined by the jury; (2) actual time until the claimant dies. This element of the bill produces a savings (referred to below as mortality savings) compared to the present system even if juries properly considered interest, inflation, and mortality.

2. If juries do not properly consider interest, inflation and mortality then it is hypothesized that the jury errs in favor of a larger award to the plaintiff.

In at least one jurisdiction (Pennsylvania) juries are instructed to assume interest and inflation are equal and offsetting factors. This instruction biases awards upward because in the long run interest rates exceeds inflation rates.

3. Low, medium and high estimates of savings result from assuming the following:
 - a. Low savings result from assuming that juries are instructed to consider interest, inflation and mortality and that on the average the jury awards correctly reflect these variables.
 - b. High savings result from assuming that juries treat interest and inflation as offsetting factors.
 - c. Medium savings result from assuming jury results between (a) and (b).

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

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D. Collateral Source Offset

1. The coverage provided by health, and long-term disability insurance to the U.S. population through employer sponsored, privately purchased and public insurance is estimated from public information sources. (Primarily the Statistical Abstract of the United States - 1985).
2. The portion of awards related to medical care and wage loss is estimated from the NAIC 1974-1978 Closed Claim study.
3. In some awards, the award amount does not fully cover the medical costs and wage loss. In these cases the collateral source offset merely recognizes the situation that already exists, and no savings is projected.
4. Legal defense costs are assumed to follow the pattern described in A.3.
5. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

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4. The savings resulting from the assumption in 4a-c are calculated considering the following:
 - a. A distribution of claimants by age and degree of injury (source: NAIC 1974 - 1978 study).
 - b. The claim size model described in A.1a - A.1c.
 - c. Average limited and unlimited claim size amounts as described in A.1.
 - d. Assumptions regarding the portion of future and past damages by claimant age and degree of injury (Actual data on this subject is not available).
5. Legal defense costs are assumed to follow the pattern described in A.3.
6. Claim amounts on settlements are assumed to follow the pattern of savings calculated for amounts awarded by juries.

Analysis of Tort Reform Proposals

Appendix C - Description of Models

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F. Combined Effect of all Reforms

1. If the effects of the various reforms were independent, the combined savings could be calculated by multiplying the complements of the individual savings.
2. For this analysis we assume that savings through the elements of the law interact and reduce the opportunity for savings in other areas. For example, reduced economic damage recoveries through application of the collateral source offset and the limit on non-economic damages reduces the percentage savings resulting from the revised contingency fee schedule (since the amount of savings depend on the size of the award). The adjustment for this interaction is a 10% reduction in the savings calculated on a multiplicative basis.
3. It is possible that the reforms will operate synergistically on the system and produce greater savings than we have projected by reducing legal defense costs, reducing the number of claims filed, etc. On the other hand, it is possible that the savings will be less than we have projected as court decisions operate in ways which we cannot forecast.

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

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E. Comments on Terminology

UNLIMITED CLAIM SIZE AMOUNT/UNLIMITED AVERAGE CLAIM SIZE

The use of claim size distributions to approximate the actual claim amounts results in predictions of claim amounts greater than those observed in practice. Reasons for the difference between theoretical distributions and actual observations include the following: (1) the amount of insurance coverage available may limit the amounts paid; (2) primary and excess insurance coverage data often cannot be combined to produce total limit data; (3) courts, particularly in the appeal process, may limit the maximum award amounts.

The theoretical claim sizes which should be observed if none of these forces operated are referred to as unlimited claim size amounts. The average size of the unlimited claim size amounts is referred to as the unlimited average claim size. The unlimited average claim size is generally larger than claim sizes observed actual experience.

LIMITED CLAIM SIZE AMOUNTS/LIMITED AVERAGE CLAIM SIZE

The observed claim size amounts and the average of limited claim size amounts are modeled using the unlimited distribution and then capping all claims at an amount referred to as the policy limit. This limitation may be the actual policy limit, if the policy limit is the major limiting force on claim amounts. The policy limit may also be interpreted as the maximum award amount sustainable in an appeal court.

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Analysis of Tort Reform Proposals

Appendix C - Description of Models

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G. Impact on Trend Rates

1. - The limitation on non-economic damages is the element of the law which would have the largest effect on future trend rates. The revised contingency fee schedule has a small effect on trend rates.
2. We used the models described in this Appendix, Section A (for the limitation on non-economic damages) and in Section B (for the limitation on contingency fees), to calculate differences between trend before the law and trend after the law over the 1985 - 1988 period for a variety of initial unlimited claim sizes and policy limits and a variety of trends in unlimited claim sizes and policy limits.

TESTIMONY IN SUPPORT OF HB567

February 11, 1987

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567

Mr. Chairman and Members of the Committee:

My name is Kay Foster. I appear on behalf of the Billings Area Chamber of Commerce to urge passage of HB567. Although the collateral source rule in Montana has not been adopted by statute it is presently recognized and adopted by the Montana State Supreme Court. It is the concern of the Chamber that this rule does drive up the cost of insurance for all Montanans and can lead to dual recovery for the same injury.

It appears that the bill presented here does guarantee that an injured party will be fully compensated when fault is determined but will not be doubly compensated by several payors. We urge your support.

Foster

VISITORS' REGISTER

COMMITTEE

FILE NO.

DATE _____

SPONSOR

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

COMMITTEE

BILL NO. 567

DATE _____

2.11-87

SPONSOR

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IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

that it was just a part of the discussion. Rep. Daily proposed and moved an amendment to strike "an adult" and insert "a youthful offender" on Page 1, line 25 and line 23 of Page 2. Rep. Mercer supported the proposed amendment. Question was called and voice vote was taken on the motion which CARRIED unanimously. Question was called on the bill. A voice vote was taken on a DO PASS AS AMENDED motion. The motion CARRIED 13-2 with Rep. Gould and Rep. Bulger dissenting. HB 633, DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 567: Rep. Rapp-Svrcek moved DO PASS. Rep. Mercer moved his amendments. Rep. Addy asked that subsection (e) be segregated, stating that there was liability insurance involved in the controversy and he felt it should come to the jury since it was one of the sources that may be available to the plaintiff. If collateral sources were disclosed, then liability insurance existence should be disclosed. Rep. Mercer said there was a clear distinction between collateral sources and somebody's liability policy. Rep. Addy stated that it was one-sided. Rep. Mercer argued that the damages award should be based on against the defendant on how much damages he did to the plaintiff, regardless of if he had insurance. Rep. Rapp-Svrcek moved his amendments. (See amendments attached). Rep. Rapp-Svrcek stated he had no objections to the information being given to the jury with regard to what the plaintiff had been paid but it needed to be fair on both sides.

Rep. Hannah discussed his concerns and questioned if there would be any danger in the jury knowing what the limits of the policy were. Rep. Rapp-Svrcek stated there were such possibilities but in the interest of fairness, protection and full disclosure, the wording of the amendment should be left in. Rep. Miles pointed out that she had no problem with double recovery but the bill had the wrong approach. Rep. Bulger said he supported these amendments because what they were trying to do was to make it a more reasonable system than they now had and the concept of the bill was that it is better for the jury to know what the true situation is. The jury needs the ability to make the person whole and to do what is fair. Without all the information, the jury is guessing in the dark. Rep. Daily moved to TABLE the bill. A voice vote was taken with the motion being carried 5-10. The motion FAILED. Further discussion on the amendments continued with Rep. Miles stating that she could not see the fairness in the bill. Rep. Mercer moved that a new subsection (c) be included in Rep. Rapp-Svrcek's amendments starting with amendment number 5. (See Amendments Attached). Question was called and a voice vote was taken. The motion CARRIED 10-3 in favor of Rep. Rapp-Svrcek amendments. Rep. Rapp-Svrcek moved DO PASS AS AMENDED. Question

was called and voice vote was taken with 11 members IN FAVOR of the motion. HB 567, DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 704: Rep. Daily moved to TABLE the bill. A voice vote was taken with 9 members in favor of the motion. HB 704, TABLED.

ACTION ON HOUSE BILL NO. 684: Rep. Addy moved DO PASS. Rep. Mercer stated that no one is certain what the impact of the bill would be and since it dealt with Workmans' Compensation, the bill should be dealt with under the scope of the other big bills dealing with that measure. Question was called. A voice vote was taken and the motion CARRIED 8-8. Rep. Addy moved to TABLE the bill. HB 684, TABLED.

ACTION ON HOUSE BILL NO. 602: Rep. Addy moved DO PASS. Rep. Mercer stated that he opposed the bill primarily because the counties would be spending too much money out of the fund, especially if the justice courts were including their actions. Rep. Hannah made a substitute motion to TABLE the bill. The motion PASSED. HB 602, TABLED.

ACTION ON HOUSE BILL NO. 632: Rep. Addy moved to TABLE the bill. A voice vote was taken and the motion CARRIED unanimously. HB 632, TABLED.

ACTION ON HOUSE BILL NO. 757: Rep. Miles moved DO NOT PASS. Rep. Addy made a substitute motion to table the bill. A voice vote was taken with all members voting in favor of the motion with the exception of Rep. Miles. HB 757, TABLED.

ACTION ON HOUSE BILL NO. 758: Rep. Addy moved DO PASS and moved to amend Page 1, line 21, striking "shall" and inserting "may". Rep. Addy stated that he wanted to permit the creation of this kind of municipal court district without requiring it. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Mercer questioned Rep. Addy in regard to why a municipal court district was being created which included something more than a city. Should not each city be a municipal court district in itself? Rep. Addy stated that they were going to strike Subsection 5 on Page 2. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Bulger stated that it was too sweeping and this was not the time to start fixing up bills. He moved to TABLE the bill. A voice vote was taken and 10 members FAVORED the motion. HB 758, TABLED.

ACTION ON HOUSE BILL NO. 687: Rep. Daily moved to TAKE THE BILL OFF THE TABLE. A voice vote was taken and the motion CARRIED. Rep. Daily moved DO PASS. A discussion followed on the proposed amendments. Rep. Daily moved that the bill

DAILY ROLL CALL
JUDICIARY

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 23, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)	✓		
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)		✓	
EARL LORY (R)	✓		

JUDICIARY

Mr. Speaker: We, the committee on

report HOUSE BILL NO. 567

☒ do pass
 ☐ be concurred in
 ☒ as amended

☐ do not pass
 ☐ be not concurred in
 ☐ statement of intent attached

Chairman

1. Title, line 9.

Strike: "MUST"

Insert: "MAY"

2. Title, line 13.

Following: "AMOUNT;"

Insert: "PROVIDING THAT EVIDENCE OF INSURANCE DEFENDANT MAY HAVE AND EVIDENCE OF PLAINTIFF'S AND DEFENDANT'S LITIGATION COSTS AND ATTORNEY FEES IS ADMISSIBLE; AMENDING SECTION 33-23-102, MCA;"

3. Page 3, line 15.

Strike: "must"

Insert: "may"

4. Page 3, line 16.

Strike: "The" through "benefits" on line 13

5. Page 4.

Following: line 13

Insert: "(5) Evidence of the following is admissible in an action arising from bodily injury or death:

(a) insurance, including liability dollar limits, that is available to defendant to pay for a judgment against defendant; and

(b) plaintiff's and defendant's current and expected future litigation costs and attorney fees.

Section 3. Section 33-23-102, MCA, is amended to read:

"33-23-102. Existence of insurance not to be made evident -- exception. No Except as provided in (section 3, subsection (3)), no attempt may be made in the trial of an action brought against a political subdivision of the state, municipality, or any public body, corporation, commission, board, agency, organization, or other public entity to suggest the existence of any insurance which covers in whole or in part any judgment or award which may be rendered in favor of plaintiff."

Renumber: subsequent section

AHB567a/SM/JML

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MONTANA STATE SENATE

JUDICIARY COMMITTEE

50TH LEGISLATURE

COMMITTEE MEMBERS: Senator Joe Mazurek, Chairman
 Senator Bruce Crippen, V. Chairman
 Senator Tom Beck
 Senator Al Bishop
 Senator Chet Blaylock
 Senator Bob Brown
 Senator Jack Galt
 Senator Mike Halligan
 Senator Dick Pinsoneault
 Senator Bill Yellowtail

STAFF ATTORNEY: Valencia Lane

COMMITTEE SECRETARY: Mary Huber

BOOK: 1 of 4

INCLUSIVE DATES: January 6 - January 30, 1987

WILLIAMS, MEL		REVISE CITY COURT JURISDICTION AND PROCEDURE		CONCUR AS AMENDED		3/17
HB0566	3/02	3/16	CHILD OR SPOUSE ABUSE TO PRECLUDE JOINT CUSTODY		193	
COMMITTEE--(S) JUDICIARY					RUN TIME 08:32	
					RUN DATE.... 04/22/87	

CHAIRMAN--SEN. JOE MAZUREK
NORMAL SCHEDULE==> SITE: ROOM 325

DAYS: MON THRU FRI

TIME: 10:00 A.M.

SECRETARY-MARY HUBER

BILL NO--	REFER DATE--	HEARING DATE--	CONSIDERATION DATES--	COMMITTEE ACTION--	REFERRER TO COMM--	DATE OUT--
HB0567	3/02	3/25		CONCUR AS AMENDED		3/27
RAMIREZ, JACK		REDUCTION OF TORT AWARD BY AMOUNT OF COLLATERAL SOURCE PAYMENTS				
HB0577	3/02	3/27		CONCUR		3/27
BROWN, DAVE		TRAINING REQUIREMENT FOR PROBATION OFFICERS				
HB0590	2/21	3/27		CONCUR		3/27
STRIZICH, BILL		EXTEND CRIME OF POSSESSION OF WEAPON BY PRISONER TO COUNTY AND CITY JAIL				
HB0592	3/02	3/18		CONCUR AS AMENDED		3/24
HARP, JOHN		ABOLISH BAD FAITH & BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING ACTIONS				
HB0598	2/21	3/27		CONCUR		3/27
RAPP-SVRCEK, PAUL		RESISTANCE NOT NECESSARY TO SHOW LACK OF CONSENT TO SEXUAL OFFENSE				
HB0605	2/21	3/13		CONCUR		3/13
BROWN, JAN		DISCLOSURE OF CHILD ABUSE AND NEGLECT RECORDS				
HB0610	3/02	3/27		CONCUR AS AMENDED	tabled 3/27	-
BROWN, DAVE		AUTHORIZE PAROLE AND PROBATION OFFICER TO CARRY FIREARMS AT CERTAIN TIMES				
HB0664	2/21	3/10		CONCUR		3/11
RAMIREZ, JACK		REVISE LAW ON JOINT OBLIGATIONS				
HB0670	3/02	3/27		CONCUR AS AMENDED		3/27
BACHINI, BOB		RAILROAD EMPLOYEE AS SPECIAL PEACE OFFICER				
HB0679	2/21	3/16		CONCUR AS AMENDED		3/19
KEENAN, NANCY		ALLOCATE DOMESTIC ABUSE FINES TO FUND BATTERED SPOUSES PROGRAM				
HB0696	3/02	3/20		TABLED	tabled 3/27	-
HANNAH, TOM		DE NOVO REVIEW OF DECISIONS OF COMMISSION FOR HUMAN RIGHTS				

Rep. Ramirez distributed amendments for the bill.
(Exhibit 4)

Senator Mazurek asked if the amendments go through other corporation sections and reference the changes made here. Rep. Ramirez said Rep. Bardanouve asked for these amendments because he was worried about private corporations being sued.

Senator Beck questioned why federal banks could not be in this bill. Mr. Bennett responded that the bill will affect the corporate charter, which is filed with the Secretary of State, for a state bank. He said we cannot mess with federal law.

Representative Ramirez closed the hearing on HB 748.

CONSIDERATION OF HOUSE BILL 567: Rep. Ramirez of Billings introduced the bill. He said HB 567 will amend the law relating to civil lawsuits as to the treatment of collateral source payments in such suits. He gave the committee two examples of cases in front of the jury. He stated a man in case #1 is injured by a power line and loses his arm. He stated he has no medical expenses paid for and no workmen's compensation or benefits which will help him. He explained in case #2, the man has the same accident but has everything paid for. He said case #2 is tried with the jury and the jury doesn't know all of the medical expenses are paid for. Rep. Ramirez said that is the "collateral source rule". He felt the rule was not fair that the jury can't obtain collateral information on a claimant. He said his bill would abolish this rule. He said society can't afford people to get "double recovery" from a suit because of this rule. He explained if the insurance company pays the expenses the second time around because of a law suit, the claimant's expenses for an injury were already paid for, the people end up paying higher premiums. He said the bill will allow a judge to see the claimant's financial record on the injury when making his decision. He pointed out the House amended into the bill that the judge has the right to know if the claimant has insurance. He felt the part of HB 567 which deals with plaintiff's and claimant's current and expected future litigation costs and attorney fees had nothing to do with this bill and would like it stricken.

PROPONENTS: Gary Neely, Montana Medical Association, supported the bill. (Exhibit 5) Mr. Neely also distributed amendments to the bill. (Exhibit 6)

Jim Robischon, Montana Liability Coalition, supported the bill and the Neely amendments. He said the Neely amendments eliminate the disclosure of liability insurance information. He commented that the Montana Supreme Court stated these disclosures are prejudicial. He commented the Neely amendments also eliminate the plaintiff's collateral source payment. He felt the plaintiff's collateral source payments are not relevant to any issue relating to the defendant's liability. He said there is no statute in Montana that prohibits the disclosure of these payments.

Randy Gray, State Farm Insurance, stated his organization did not like the disclosure of insurance information to the jury. He said his organization supported the Neely amendments.

Kay Foster, Governor's Council on Economic Development, testified in support of the amended HB 567.

Jacqueline Terrell, American Insurance Association, testified that the American Insurance Association stands in support of the bill because of the Neely amendments presented; however, her organization did not agree with subsection 5 (a) and 5 (b) which is the disclosure of insurance in the bill's present form. She said the state would be the only state that would allow disclosure of insurance information.

OPPONENTS: Karl Englund, Montana Trial Lawyers Association, gave the committee an evaluation of proposals to eliminate the collateral source rule. (Exhibit 7) He stated the rule is based on a policy decision and not on the basis of punishment. Mr. Englund pointed out people should not be left "off the hook" from a lawsuit just because the person that was injured can pay for expenses because he carries insurance. Mr. Englund presented charts to the committee explaining a case.

Current Law	Proposed Bill
Verdict.....\$100,000	\$100,000
Litigation Costs.. -40,000	-40,000
Collateral Source. +20,000	-0-
Other..... -0-	-0-
Net Recovery \$ 80,000	\$ 60,000

He showed the committee what the monetary difference would be in using the proposed bill now. He said it will cause the victim's recovery to reduce 20 percent; the insurance company will get \$20,000 windfall, and a fair trial concept is jeopardized. He felt the proposed bill takes the jury's attention away from the real case. Mr. Englund stated SB 252 would cause the "double payment" to go back to the insurance compane that insured the claimant. He didn't want to see the trial weighed down with too many issues, so Mr. Englund liked Mr. Neely's proposal but wanted to make sure the bill would only go into action on a true "double recovery" case. Mr. Englund thought an amendment to Mr. Neely's new section 2; the court must reduce to the extent that the payments from the collateral source exceed the litigation cost; would allow the court to decide if there truly was a double recovery.

John Hoyt, representing himself, stated the bill will cause the court system to increase its judges in all levels and increase the lawyer population. He felt "double recoveries" are not existent. He felt there will be people having double reductions with HB 567. He asked if the intent of this bill means a person can't buy insurance for his own protection. He believed self insurers will be affected by the bill and so will the injured person.

Tom Keegan, representing injured people, stated a person who is injured might end up, after a lawsuit, with just his insurance premium. He felt this bill was very unfair. He expressed that if the bill discloses insurance information for health, it should then disclose life insurance too. He said this bill is just a myth because no one gets rich because he was hit by a car. He hoped the committee would kill the bill.

Sue Weingartner, Montana Association of Defense Counsel, opposed the bill because of the new House language on page 4, about the disclosure of insurance and the attorney fees section.

Glen Drake, American Insurance Association, opposed the bill. (Exhibit 8)

DISCUSSION ON HOUSE BILL 567: Senator Mazurek asked why the bill is no longer a big problem for the Montana Trial Lawyers Association like it was at the special session.

Karl Englund said there was a concern, that was all. Senator Mazurek asked Mr. Englund if he supports the bill the way the evaluation bill from Exhibit 7 states. Mr. Englund answered yes, or the Neely bill would be fine. Senator Mazurek asked why the House made the bill discretionary on page 3, line 19. Mr. Englund replied if the jury follows this bill, they should not be mandated to reduce the verdict.

Representative Jack Ramirez closed by saying the lawsuits are to compensate the injured so it will get complicated, but the courts know all about these kinds of suits, so it will not weigh the court system down. He expressed the bill should not cover a double recovery or trick the jury into trying to award the plaintiff enough to cover litigation costs. He commented if the committee wants to have subrogation rights, put it in the bill, but say everyone can have subrogation rights because the jury doesn't know if the claimant can work again or not. He didn't believe in keeping information from the jury because it is not fair to the defendant.

CONSIDERATION OF HOUSE BILL 474: Representative Janet Moore, Condon, Montana, introduced HB 474, which provides that the officers and directors are jointly and severally liable for the unpaid wages of an employee of the corporation in the following circumstances:

- 1) the corporation becomes insolvent and continues to operate for a period of 30 days after insolvency (but not more than 30 days?);
- 2) the corporation disposes of its assets and dissolves before paying the unpaid wages of any of its employees;
- 3) a director or officer commingles substantial assets of the corporation with his personal assets;
- 4) an officer holds the corporation out to be a sole proprietorship, a partnership, or an unincorporated association or organization (holds out to whom? the employee? others?).

Rep. Moore stated a constituent asked her to carry this bill. She felt the bill will only affect the "fly-by-night" corporations. She stated Rep. John Mercer would assist in the legal aspects of the bill.

PROPONENTS: Don Judge, Montana AFL/CIO, said this problem of unpaid wages is growing. He said the bill turns the unpaid wages into a lien. He explained a story about contractors that just left Helena and did not pay their workers for their labor on hail damaged houses.

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bryan Enderle	Missoula Chamber of Commerce	474		X
Elwood English	Secretary of State	437 48	X	
Tom KEEGAN		567		X
Bob Murdo	State Bar Business Law Section	HB 720	X	
Bob Conner	Boz. Chamber	567-720	X	
Kay Foster	Boz. Chamber	567	X	
John C Hoyt	Gov. Council on Ec. Develop.	567		X
Bryan Enderle	Hoyt & Bennett	567		X
Don Jagers	Missoula Chamber of Commerce	567/720/748	X	
John Allen	MT Chamber of Commerce	720	X	
Frank Allen	Great Falls Bus Co	748	X	
Tim H. H. H.	Mr. Ralph Olson	748	X	
W. H. Brown	Self -			
Marjorie Terrell	MAA	748	✓	
"	AIA	567	amends	X
"	"	474		X
Roger McGlen	INDEPENDENT INS. AGENTS ASSOC. of MT	567	✓ Amends	
Ted J. Dorey	Making Payments Association	720	X	
Brian EINS	Applied Management Corp.	748		
Brian EINS	MT Medical Assn	HB 567	X	
Brian EINS	MT Medical Assn	HB 748	X	
Gerald J. Neely	"	HB 567	X	
Randy Gray	Stat. Farm + NAIT	567	X amends	
Marcell C. Davis	MT Farm School - Woodbushes	HB 720	✓	
Amy Guth	"	720	X	
Steven C. Bahls	U of M Law School	720	X	

ROLL CALL

Judiciary

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 7

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blavlock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		
	X		

Each day attach to minutes.

LEGISLATIVE PROPOSALS OF THE MONTANA MEDICAL ASSOCIATION

DUPLICATE PAYMENTS TO INJURED PARTIES

A. SUMMARY OF POSITION ON HB 567

The Montana Medical Association supports the mandatory reduction of awards by certain duplicate payments or collateral sources, regardless of whether that offset is done by the judge or - in jury cases - by the jury.

This type of legislation is one of the few types of "tort reform" which can be shown to have a demonstrable effect on premium rates and the availability of insurance.

Opponents of this legislation have acknowledged the fact that duplicate payments occur. In their support of SB 252 - which would provide a right of subrogation to disability carriers - they have acknowledged that the question is one of policy: will disability carriers or casualty carriers receive the return of the duplicate payment?

If the disability carriers receive it, the injured party does not benefit unless there is a subsequent reduction in the premiums already charged for disability insurance taking account of the payments without a current right of subrogation. If the casualty carrier receives it, the injured party - by virtue of the terms of HB 567 - provides for a guaranteed return of the premiums paid for such insurance by the patient.

B. POLICY REASONS FOR LEGISLATIVE PROPOSAL

The general objectives of the legislation are to:

- to reduce some of the amounts of duplicate payments which plaintiffs receive from third parties in addition to that which they receive in awards, after giving credit for certain contributions made by the plaintiffs or their employers
- thus assuring that plaintiffs receive full compensation, but not more than full compensation in major cases
- thus to some degree shifting a portion of the economic losses in casualty cases to the more efficient, high-volume accident and health insurers and away from the casualty insurers
- thus further assuring the affordability and availability of medical malpractice insurance

C. SCIENTIFIC EVIDENCE OF LINK WITH DOWNWARD IMPACT ON PREMIUMS

The legislation has been shown to have a "downward impact" on premiums, i.e. the savings could be realized in the form of increases which

are not as large as previously, and would not necessarily result in lower premiums, which no form of legislation can assure.

An actuarial survey undertaken by an independent actuarial firm at request of the American Medical Association indicated a total savings in premiums of 8% of the premium dollar from legislation implementing legislation eliminating major duplicate payments. ¹

The RAND STUDY concluded that states that enacted a mandatory collateral offset, the severity of awards drops by 50%, on average, within two years time. ² The Danzon study found that reductions of amounts received from collateral sources reduce malpractice awards severity by an estimated 30 to 40 percent. ³

The Report of a special committee of the American Bar Association found as follows: ⁴

"One tort change which is likely to have a measurable impact on premium costs is the repeal of the collateral source rule, so that costs now reflected in medical malpractice premiums would be shifted to first-party health and accident insurance and government health insurance programs. There would also be some overall savings due to the elimination of overlapping payments and the greater administrative efficiency of the collateral payers."

"With the help of an experienced consultant, the Commission attempted to estimate the potential savings in malpractice awards in a 'typical' state which had broadly repealed the collateral source rule. While the conclusions necessarily reflect certain arbitrarily chosen assumptions, the Commission is reasonably confident that malpractice awards would be reduced by about 10 to 20 percent depending on the tendency

¹ November 22/29, 1985. American Medical News, p. 19. AMA General Counsel's Office commission of actuarial survey by Milliman & Robertson, Inc, New York. Survey: Actuarial Analysis of American Medical Association Tort Reform Proposals, September, 1985.

² Danzon, P.M.: The Frequency and Severity of Medical Malpractice Claims. Santa Monica, Rand Institute for Civil Justice, 1983.

³ Danzon, Medical Malpractice: Theory, Evidence and Public Policy, Harvard Univ. Press (1985), p. 170.

⁴ 1977 Report Of the Commission On Medical Professional Liability. 1977. American Bar Association, pp. 55 - 58. The Report recommended that recovery of damages should be reduced by collateral source payments, and that subrogation should not be allowed to any collateral sources for medical benefits thus set off. The Report concluded that the set-off of collateral source payments should be mandated as a matter of law rather than left to the jury's discretion and that legislation should require that the trial judge deduct all collateral source payments from the jury's award before entering judgment. The jury would be instructed to resolve any dispute as to the amount of a collateral source payment under the ABA Committee proposal.

of the fact-finder to ignore evidence of collateral sources."

An article on elective no-fault insurance in the Minnesota Law Review reviewed studies available in the late 1970's, which concluded that other available sources of compensation such as Blue Cross, Blue Shield, accident and health coverage, and the like amount to at least 11% of the total tort recoveries, which amounted to 6% of the premium dollar.

The writer of the article cited another study updating that of the first and including the overlapping of compensation that results from the fact that a claimant is excused from paying income tax on the compensation he receives for the amount of wages lost, on which he would have had to pay a tax if he had received that amount in wages. The writer concluded that a figure of 8 cents on the premium dollar constituted a very conservative estimate of overlapping compensation. ⁵

E. CONSTITUTIONALITY OF LEGISLATION

Many states - some 27 - have statutorily reversed the collateral source rule. The changes have been upheld in five states, struck down in four states, and allowed to expire under Sunset legislation in another. ⁶

But no state or federal court has ever held the concept of collateral source abolition unconstitutional.

In each instance where a statute has been struck down, it has been on circumstances which could not occur with the proposed legislation.

• A Kansas federal court declared unconstitutional on grounds of equal protection a collateral source law which applied only to medical malpractice cases and which allowed the admissibility of evidence as to duplicate payments from non-insurance sources and excluded collateral sources which were received from insurance sources. Doran v Priddy, 534 F. Supp. 30 (1981)

• A North Dakota Supreme Court decision declared a medical malpractice act - which included a collateral source rule section - unconstitutional because there was no factually-demonstrated crisis of availability or cost of medical malpractice insurance in the state. Arneson v Olson, 270 N.W. 2d 125 (N.D. 1978). With the passage of Initiative 30, such a finding would not be required, nor is the legislation under consideration so limited in scope.

• The New Hampshire Supreme Court has declared unconstitutional, as denying equal protection of the laws, legislation pertaining medical malpractice cases only which, among other things, abolished the collateral source rule, using a standard greater than the "rational basis" standard which would be applicable in Montana, on the grounds that the act

⁵ Minnesota Law Review, "Elective No-Fault", 1976, Vol. 60:501,504-505, at n. 11.

⁶ Allow to expire in Idaho; overturned in Kansas, New Hampshire, North Dakota, and Pennsylvania.

EXHIBIT NO. 5
DATE 3-25-87
BILL NO. H.B. 567

4

arbitrarily and unreasonably discriminated in favor of the class of health care providers. Carson v Maurer, 424 A.2d 825 (NH 1980).

Prepared by the Montana Medical Association,
2021-11th Ave., Helena, Montana 59601, G. Brian
Zins, Executive Director, 406-443-4000.

3/87

LEGISLATIVE
PROPOSALS -

DUPLICATE
BENEFITS

* * * * *

AN EVALUATION OF PROPOSALS TO ELIMINATE

THE COLLATERAL SOURCE RULE

* * * * *

Prepared by the Montana Trial Lawyers Association

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C. Elimination of the Collateral Source Rule Will Create a "Windfall" for the Insurance Industry.	3 - 4
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IV. PROPOSED AMENDMENT TO CURRENT BILLS	Attached

STANDING COMMITTEE REPORT

SENATE

SCRHB567

March 26, 1987

MR. PRESIDENT

Judiciary

We, your committee on.....

House Bill

567

having had under consideration..... No.....

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REDUCTION OF TORT AWARD BY AMOUNT OF COLLATERAL SOURCE PAYMENTS

Ramirez (Mazurek)

Respectfully report as follows: That.....House Bill..... No.....567.....

BE AMENDED AS FOLLOWS:

1. Title, lines 5 through 17.

Following: "PROVIDING"

Strike: remainder of line 5 through "MCA" on line 17

Insert: "FOR THE REDUCTION OF JURY AWARDS BY THE TRIAL COURT FOR AMOUNTS PAID OR PAYABLE FROM COLLATERAL SOURCES"

2. Page 3, line 13 through page 5, line 9.

Strike: sections 2 and 3 in their entirety

Insert: "Section 2. Collateral source reductions in actions arising from bodily injury or death - - subrogation rights. (1) In an action arising from bodily injury or death when the total award against all defendants is in excess of \$100,000 and the plaintiff will be fully compensated for his damages, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

(2) Before an insurance policy payment is used to reduce an award under subsection (1), the amount the plaintiff paid and is obligated to pay to keep the policy in force must be deducted from the amount of the insurance policy payment.

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(3) The jury shall determine its award without consideration of any collateral sources. After the jury determines its award, reduction of the award must be made by the trial judge at a hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources. Evidence is admissible at the hearing to show that the plaintiff has been or may be reimbursed from a collateral source that does not have a subrogation right. If the trial judge finds that, at the time of hearing, it is not reasonably determinable whether or in what amount a benefit from such a collateral source will be payable, he shall:

(a) order any person against whom an award was rendered and who claims a deduction under this section to make a deposit into court of the disputed amount, at interest; and

(b) reduce the award by the amount deposited. The amount deposited and any interest thereon are subject to the further order of the court, pursuant to the requirements of this section.

(4) Except for subrogation rights specifically granted by state or federal law, there is no right to subrogation for any amount paid or payable to a plaintiff from a collateral source if an award is reduced by that amount under subsection (1)."

Renumber: subsequent section

AND AS AMENDED
BE CONCURRED IN

XXXXXX

XXXXXXXXXX

CONTINUED

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Chairman

C:\LANE\WP\AMEND\HB567.

Senator Mazurek

ALTERNATIVE PROPOSAL: House Bill 567

1. Bill Title Of Current HB 567. The following new bill title:

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR THE REDUCTION OF VERDICTS BY THE TRIAL COURT FOR AMOUNTS PAID OR PAYABLE FROM COLLATERAL SOURCES"

2. Section 1 Of Current HB 567. Keep Section 1 the same.

3. Section 2 Of Current HB 567. Replace Section 2 with the following:

"Section 2. Collateral source reductions in actions arising from bodily injury or death -- subrogation rights.

(1) In an action arising from bodily injury or death where the total verdict against all defendants is in excess of \$ 50,000, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right under state or federal law.

(2) Before an insurance policy payment is used to reduce an award under subsection (1), the amount plaintiff paid or is obligated to pay to keep the policy in force for the policy period during which the insurance policy payment was made must be deducted from the amount of the insurance policy payment.

(3) The jury shall determine its verdict without consideration of any collateral sources. Reduction of the jury's verdict must be made by the trial judge after the jury determines its verdict, at hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources. Evidence is admissible at such hearing to show that plaintiff has been or may be reimbursed from a collateral source that does not have a subrogation right under state or federal law. If the trial judge finds that it is not, at the time of hearing, reasonably determinable whether or in what amount a benefit from such a collateral source will be payable, the trial judge shall: (a) order a deposit into court, at interest, of the disputed amount, by ~~the legal representative of~~ any person against whom a verdict was rendered who claims a deduction under this section; (b) reduce the verdict by the amount deposited. The amount deposited, and any interest thereon, shall be subject to the further order of the court, pursuant to the requirements of this section.

(4) Except for subrogation rights specifically granted by state or federal law, there is no right to subrogation for any amount paid or payable to a plaintiff from a collateral source if an award is reduced by that amount under subsection (1)."

3. Section 3 Of Current HB 567. Delete Section 3 in its entirety.

I. INTRODUCTION

In Montana, the collateral source rule provides "that a payment to [an injured victim] from a source wholly independent of and not in behalf of the wrongdoer cannot inure to the benefit of the wrongdoer to lessen the damages recoverable from him, and the evidence of such payment is inadmissible". Goggans v. Winkley, 159 Mont. 85, 92, 495 P.2d 594, 598 (1972). Thus, the rule is predicated upon the general notion that the wrongdoer should not benefit because a victim has been prudent enough to buy her own insurance or because he or she is fortunate enough to have friends or relatives who are willing to provide valuable services without pay during a time of need.

This rule is now under attack. The general argument advanced is that the rule allows the victim to be paid twice for damages such as medical expenses covered by insurance and thus, provides the injured party with a "windfall". The proponents of change also maintain that evidence regarding collateral sources should be presented to juries to reduce awards. Close analysis of the situation, however, shows the following:

- (1) Even with the collateral source rule, the victim rarely, if ever, receives a "windfall", and indeed, is not fully compensated for losses;
- (2) In fact, elimination of the collateral source rule will only further deprive an injured victim of full compensation; and
- (3) Elimination of the rule will have adverse social consequences. It will create a "windfall" for the insurance industry at the expense of the victim.

(4) Moreover presenting collateral source evidence to juries will distract from the major issues and will create confusion for the juries. Thus, it will waste court resources and will jeopardize the victim's opportunity to obtain a fair trial.

Each of these points are discussed in detail below.

II. DISCUSSION

A. THE VICTIM IS NOT FULLY COMPENSATED UNDER THE CURRENT SYSTEM.

First, the victim rarely receives "double recovery" for his losses because the expenses of modern litigation far exceed anything he can recover through the collateral source rule. Expert medical testimony, for instance, often costs thousands of dollars. Indeed, physicians who charge only \$25 to their patients for an office visit, often charges the same patient \$250 or even \$500 per hour if they have to assist them in litigation. Some physicians have, in fact, charged their patients over \$700 per hour for testimony related to their injuries. Nonmedical expert testimony is just as expensive. Other litigation costs and attorney fees leave the victim with a net recovery of approximately 60% or less of his overall damages, since none of these expenses are recoverable under current laws. The value of the victim's compensation is further diminished because the wrongdoer or his insurance company is not required to pay any interest on the amount owed between the time of the injury and the date of entry of judgment, a period which usually exceeds two years and sometimes exceeds a half a decade.

The amount the victim recovers through the application of the collateral source rule is far less than his overall litigation expenses in virtually every case. This, as a practi-

cal matter, eliminates any opportunity for the victim to be compensated twice and thus, to obtain a "windfall" or "double recovery" as you are now being told.

On the other hand, the collateral source rule serves as a practical device for the injured party to recoup, at least, part of his non-compensable litigation costs and interest. This, of course, furthers the public policy that all injured persons should be fully compensated under the law.

B. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL ONLY FURTHER VICTIMIZE THE INJURED PARTY.

As shown above, in virtually every instance, litigation costs exceed any benefit derived from the collateral source rule. If the rule were eliminated, the victim would receive an even smaller percentage of his overall lawful damages than he is receiving at the current time. Thus, elimination of the rule does more harm than it does good.

C. ELIMINATION OF THE COLLATERAL SOURCE RULE WILL CREATE A "WINDFALL" FOR THE INSURANCE INDUSTRY.

As stated above, the collateral source rule benefits those that are prudent enough to purchase their own insurance. This insurance, of course, does not come free. The insured person pays a premium for it. The insurance company takes money from this person to undertake the risk that there is going to be an injury. When the injury occurs, all the insurance company is doing is paying for the risk it has underwritten. In other words, it is simply fulfilling its contract. The collateral source rule allows the victim to, in effect, recover some of the

including expert witness fees, many deposition and investigative costs, and attorney fees will not be paid by the wrongdoer, but will have to be paid out of the verdict? In other words, if we are going to allow a jury to reduce the verdict by considering collateral benefits, shouldn't we also allow it to increase the verdict by considering all of the expenses that reduce the net recovery?

The current collateral source rule, which prohibits a jury from considering evidence of collateral sources of payment is predicated partially on the notion that "collateral matters involving transactions between others" only confuse the issues, wastes the jury's and court's time, and leads to consideration of matters which are no business to the wrongdoer or his insurance company. See Goggans, supra. This underpinning of the rule is probably more applicable now than it was in the past. If our aim is to streamline our judicial system in terms of both time and money and also to further the public policy of just compensation for injuries, then we should resist any attempts to make drastic changes in the current rule.

III. SUMMARY AND SUGGESTED SOLUTION

In summary, the collateral source rule, at least, provides the victim with a partial set off for his or her litigation costs. In the vast majority of the cases, however, collateral benefits do not even approach overall costs, and thus, their elimination would only compound the problem of incomplete compensation. Moreover, abolishing the rule would only create a "windfall" for insurance companies that have received premiums,

DATE 3-25-87

BILL NO. H.B. 567

premium he or she has paid over the years to be covered for these risks. In that sense, the victim does not receive any "windfall" at all. He is simply getting what he paid and bargained for.

The party that receives the windfall is the insurance company that has received premiums from the negligent party. It gets to keep the premiums the negligent party has paid to it, but does not have to pay for the risk caused by the negligent party's actions. Certainly, this is unfair to both the victim and to the negligent party, who have paid premiums to be covered for these risks.

D. PRESENTING COLLATERAL SOURCE EVIDENCE TO THE JURY..

There are still other problems. Those that advocate eliminating the collateral source rule also want the jury to be presented with evidence concerning who made collateral payments, how much was paid, when they were paid, whether or not they will continue to be paid in the future, and so on. The purported objective of such evidence is to allow the jury to offset the total amount of damages by the amounts expected to be paid by collateral sources.

If the jury is going to be allowed to hear this evidence, however, should not it also be allowed to hear evidence concerning how much the victim has previously paid out in premiums in order to be compensated with collateral insurance benefits? Should not it also be allowed to know that between the time of the injury and the time of judgment, the victim receives no interest on the amounts due to him in compensation? Moreover, shouldn't the jury be allowed to know that litigation costs,

1 BILL NO. _____

2 INTRODUCED BY _____

3 BY REQUEST OF THE

4 A BILL FOR AN ACT ENTITLED: "PREVENTION OF DOUBLE RECOV-
5 ERY".
6

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
8

9 Section 1. A new section should be enacted to
10 read:

11 Declaration of policy. It is the policy of this
12 state that all persons injured through the fault of another
13 should receive full compensation for all injuries defined
14 under the law and that the wrongdoer should not benefit at
15 the victim's expense. It is also the public policy of this
16 state that a person should not receive more than his just
17 and lawful compensation, after consideration of costs and
18 expenses incurred to recover lawful damages. This Act is
19 designed to promote these policies.

20 Section 2. A new section should be enacted to
21 read:

22 Definitions. The following words, as used in this
23 Act, shall have the meaning set forth below, unless the
24 context clearly requires otherwise:

25 (a) "Claimant" means any person who brings a

1 personal injury action. When the action is brought on
2 another's behalf, the term "claimant" includes a guardian,
3 parent, personal representative, or whoever is acting in the
4 representative capacity of the injured party.

5 (b) "Collateral sources" are sources of compensa-
6 tion paid or given to the claimant for damages by someone
7 other than the wrongdoer.

8 (c) "Litigation costs" mean all reasonable and
9 necessary costs and expenses incurred by a claimant to
10 recover lawful damages including but not limited to,
11 witness fees, investigation costs, expert fees, attorney
12 fees and similar litigation expenses. Litigation costs
13 include such expenses regardless of whether or not the
14 claimant is compensated by settlement or judgment or before
15 suit is filed in a court of law.

16 (d) "Payments" refer to economic losses paid or
17 payable by collateral sources for wage loss, medical costs,
18 rehabilitation costs, services, and other out-of-pocket
19 costs incurred by or on behalf of a claimant for which that
20 party is claiming recovery through a tort suit.

21 (e) "Wrongdoer" means a person or party legally
22 responsible for damages sustained by a claimant.

23 Section 3. A new section should be enacted to
24 read:

25 Collateral Source Rule. (1) Payments to the

1 claimant from a collateral source cannot inure to the
2 benefit of a wrongdoer to lessen the damages recoverable
3 from him. This collateral source rule shall be applied in
4 all cases where litigation expenses exceed such payments,
5 and thus, net recovery by the claimant is less than his
6 overall lawful damages.

7 (2) The collateral source rule is inapplicable
8 only to the extent that payments exceed litigation expenses,
9 and thus, to apply it would create a net recovery for the
10 claimant beyond his lawful damages.

11 (3) When a wrongdoer alleges that the collateral
12 source rule should not be applied because payments exceed
13 litigation costs, he may petition the district court having
14 proper venue and jurisdiction over the controversy to
15 convene an evidentiary hearing to determine the reasonable
16 value of litigation costs and collateral payments. If the
17 district court determines that collateral payments exceed
18 litigation costs, it shall order that any excess collateral
19 payments be deducted from the lawful damages recovered by
20 the claimant through settlement or judgment.

21 (f) Any motion or petition by the wrongdoer under
22 subparagraph (3) above, shall be made within 30 days in
23 cases of settlement between the parties or within the time
24 provided for requesting a new trial under Montana Rule of
25 Civil Procedure 59(b) in the cases of a judgment.

1 Section 4. A new section to read:

2 Collateral payments shall not be introduced as
3 evidence. The payment to the victim from collateral sources
4 shall not be admissible as evidence at a trial to determine
5 lawful damages, but shall be determined and applied under
6 the rules set forth in this Act.

7 -End-
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but will be able to escape risks they have insured for. Furthermore, presentation of collateral source evidence to a jury without consideration of expenses that reduce the net amount the victim will recover would be unfair. It would also confuse the major issues the jury must decide and cause unnecessary drains on the court's resources.

Thus, at best the collateral source rule should be modified and not eliminated. If it is to be changed, it should accomplish only the following:

(1) Apply only in those rare situations where the victim really does receive a "double recovery" (i.e. where collateral sources exceed litigation expenses).

(2) Require the negligent party's attorney to petition the court for a reduction in the verdict or settlement if a "double recovery" is expected. In this way, judicial resources and moneys are not wasted in the vast majority of cases where "double recovery" does not occur.

(3) Let the Court--not a jury--decide what the appropriate setoff should be. To do otherwise is, again, a tremendous waste of time and money. The confusion and complexity it will generate will also jeopardize the ability to get a fair trial.

A proposed amendment, tailored to achieve these fair objectives, is attached.

TESTIMONY OF GLEN L. DRAKE
ON BEHALF OF THE
AMERICAN INSURANCE ASSOCIATION
IN RE HB567
BEFORE THE SENATE JUDICIARY COMMITTEE

House Bill 567 is one of several bills designated and designed as "tort reform" bills. In its initial form, HB567 was a very important bill as it would have eliminated double recovery for many plaintiffs and, thus, would have reduced the overall cost of the tort system.

House Bill 567, as now written, has become a anti-tort reform bill designed by the plaintiffs' bar to further increase the costs of doing business and the cost of insurance in the state of Montana.

The problem with HB567 is the amendment that has been placed in Section 2 (5) of the bill. That amendment requires the admissibility in evidence of (a) insurance, including liability dollar limits, that is available to defendant to pay for judgments against defendant, and (b) plaintiffs' and defendants' current and expected future litigation costs and attorneys fees.

The effect of Section 2(5) is a double-whammy against the defendant. As to the admissibility of insurance liability dollar limits under Section 2(5)(a), our Supreme Court long has held that the evidence is inadmissible and prejudicial in any case. The net effect of that provision is to do away with all of our long-held principles of honesty and fair play in the legal system. In no other cases but those involving punitive damages is the wealth or lack of wealth of the defendant an issue. Yet this bill would make the availability of insurance admissible in all cases.

Section 2(5)(b) is likewise equally abhorrent. This section would allow double recovery by a plaintiff of his costs. Section 25-10-201, MCA, provides what costs are recoverable by the successful party. Section 25-10-501, MCA, provides that the successful party shall deliver to the clerk and the adverse party his bill of costs within five days of the verdict. Section 25-10-504, MCA, provides that the clerk must include in the judgment entered up by him the costs. Thus, under HB567 as now proposed, the evidence as to costs is presented to the jury so that a jury award will include the same for the plaintiff and the aforementioned sections will then provide for an additional taxing of the same costs again - a double recovery for the plaintiff.

Additionally, Section 2(5)(b) permits evidence of expected future litigation costs and attorney fees. This evidence necessarily would be speculative, again an element of damages consistently disapproved by the Montana Supreme Court.

Should full disclosure of all insurance evidence truly be the intent of this legislature, then clearly the bill should be amended to also require evidence and jury instructions regarding the nontaxibility of tort damages.

It is respectfully submitted that if the legislature desires to give any relief to the consuming public in the state of Montana from the ravages of a tort system out of control Section 2(5) of HB567 should be stricken from the bill, or in the alternative, HB567 should be killed.

EXHIBIT NO. 8

DATE March 25 1987

BILL NO. HB 567

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It is respectfully submitted that if the legislature desires to give any relief to the consuming public in the state of Montana from the ravages of a tort system out of control Section 2(5) of HB567 should be stricken from the bill, or in the alternative, HB567 should be killed.

ACTION ON HOUSE BILL 761: Senator Pinsoneault moved amendments that Valencia Lane gave the committee. (Exhibit 9) The rest of the committee didn't care for the bill because of constitutional problems. Senator Brown made a substitute motion to TABLE the bill. The motion carried with Senators Pinsoneault, Galt, Crippen and Beck voting no.

ACTION ON HOUSE BILL 790: Senator Pinsoneault moved to TABLE the bill. The motion carried with Senators Galt, Bishop, Crippen and Beck voting no.

ACTION ON HOUSE BILL 478: Senator Beck wanted to try HB 478 again. Karl Englund presented amendments that would sunset the bill in 4 years and the bill will only cover the spraying process of the weeds with this amendment. Senator Beck moved the amendments. The motion carried. The committee was not convinced with the bill because of the low standard of degrees of liability that were in its contents. Senator Beck moved the bill. The motion FAILED on a tie vote roll call.

ACTION ON HOUSE BILL 567: Senator Crippen moved to delete on page 4, lines 20-22, the language on those lines. Senator Mazurek said all this amendment does is allow the jury to know how much insurance a person has.

Senator Pinsoneault said the jury should know how much liability insurance a person has. Senator Mazurek said the fear of not knowing is "double recovery". He said the fear of knowing is the verdict will be high if the person has insurance.

Senator Pinsoneault moved a substitute motion to delete just (b) on page 3, lines 23 and 24. The motion carried. The motion Senator Crippen made carried also, with Senators Brown, Halligan, Pinsoneault and Blaylock voting no.

Senator Halligan moved HB 567 BE NOT CONCURRED IN because the bill will raise insurance rate premiums. The motion failed. (see roll call vote) The committee moved on.

ACTION ON HOUSE BILL 670: Senator Halligan moved Driscoll's first amendment that he presented during the hearing.

Senator Bishop thought the cost of attorneys fees should be included. The motion carried.

Senator Brown moved HB 670 BE CONCURRED IN AS AMENDED. The motion carried.

ACTION ON HOUSE BILL 610: Senator Pinsoneault moved to TABLE HB 610. The motion carried with Senators Halligan and Galt voting no.

ACTION ON HOUSE BILL 567: Senator Yellowtail moved the Neely amendment. (See Standing Committee Report). The motion carried. Senator Crippen moved HB 567 BE CONCURRED IN AS AMENDED. The motion carried with Senator Halligan voting no.

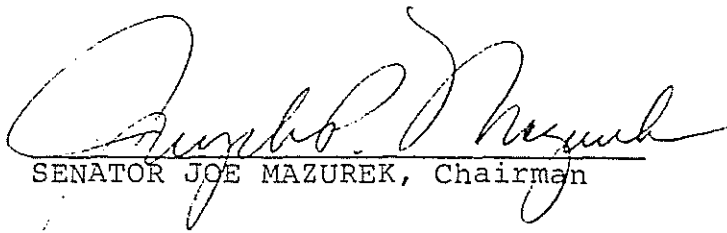
ACTION ON HOUSE BILL 696: Senator Yellowtail moved to TABLE the bill. The motion carried with Senators Galt, Crippen, Bishop and Beck voting no.

ACTION ON HOUSE BILL 400: Valencia Lane submitted amendments to HB 400 to the committee. (Exhibit 10) Senator Yellowtail moved to TABLE the bill. The motion failed with Senators Halligan, Brown and Yellowtail voting yes.

Senator Beck moved the bill BE CONCURRED IN. Senator Yellowtail substituted the motion to amend in the sponsor's amendments. (Exhibit 11)

Senator Mazurek pointed out there are good safety reasons for discriminating against age when renting, because of steep stairs and high balconies. The sponsor's amendment carried. Senator Pinsoneault moved HB 400 BE CONCURRED IN AS AMENDED. The motion carried with Senator Brown voting no.

ADJOURNMENT: The meeting adjourned at 12:00 noon.


SENATOR JOE MAZUREK, Chairman

STANDING COMMITTEE REPORT

SCRB8567

March 26, 1967

MR. PRESIDENT

Judiciary

We, your committee on

House Bill

567

having had under consideration

No.

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REDUCTION OF TORT AWARD BY AMOUNT OF COLLATERAL SOURCE PAYMENTS

Ramirez (Mazurek)

Respectfully report as follows: That House Bill

No. 567

BE AMENDED AS FOLLOWS:

1. Title, lines 5 through 17.

Following: "PROVIDING"

Strike: remainder of line 5 through "HCA" on line 17

Insert: "FOR THE REDUCTION OF JURY AWARDS BY THE TRIAL COURT FOR AMOUNTS PAID OR PAYABLE FROM COLLATERAL SOURCES"

2. Page 3, line 13 through page 5, line 9.

Strike: sections 2 and 3 in their entirety

Insert: "Section 2. Collateral source reductions in actions arising from bodily injury or death - - subrogation rights. (1) In an action arising from bodily injury or death when the total award against all defendants is in excess of \$100,000 and the plaintiff will be fully compensated for his damages, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

(2) Before an insurance policy payment is used to reduce an award under subsection (1), the amount the plaintiff paid and is obligated to pay to keep the policy in force must be deducted from the amount of the insurance policy payment.

DO NOT PASS

DO NOT PASS

CONTINUED

Chairman.

CONTINUED

SENATE JUDICIARY

RS 567

Page 2

March 27,

1987

(3) The jury shall determine its award without consideration of any collateral sources. After the jury determines its award, reduction of the award must be made by the trial judge at a hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources. Evidence is admissible at the hearing to show that the plaintiff has been or may be reimbursed from a collateral source that does not have a subrogation right. If the trial judge finds that, at the time of hearing, it is not reasonably determinable whether or in what amount a benefit from such a collateral source will be payable, he shall:

(a) order any person against whom an award was rendered and who claims a deduction under this section to make a deposit into court of the disputed amount, at interest; and

(b) reduce the award by the amount deposited. The amount deposited and any interest thereon are subject to the further order of the court, pursuant to the requirements of this section.

(4) Except for subrogation rights specifically granted by state or federal law, there is no right to subrogation for any amount paid or payable to a plaintiff from a collateral source if an award is reduced by that amount under subsection (1)."

Remember: subsequent section

AND AS AMENDED
BE CONCURRED IN

Senator Masurek

4-16-1987

MR. SPEAKER

Page 2 of 2

We, your _____ FREE _____ Conference Committee on
House Bill 567
met and considered _____ House Bill 567 in its entirety.

We recommend as follows

That HB 567, reference copy (salmon), be amended
as follows:

1. Page 5, line 16.
Strike: "\$100,000"
Insert: "\$50,000"

2. Page 5, line 17.
Following: "DAMAGES,"
Insert: "exclusive of court costs and attorney fees,"

3. Page 5, line 21.
Following: "(1),"
Insert: "the following amounts must be deducted from the amount
of the insurance policy payment: (a)"

4. Page 5, line 22.
Following: "PAID"
Insert: "for the 5 years prior to the date of injury;
(b) the amount the plaintiff paid from date of injury to
date of judgment;"

CONTINUED

And that this Conference Committee report be adopted

FOR THE SENATE

FOR THE HOUSE

Sen. Halligan, Chairman

Rep. Ramirez

Sen. Bishop

Rep. Hannah

Sen. Mazurek

Rep. Miles

ADOPT REJECT

5. Page 5, line 22.

Following: "AND"

Insert: "(c) the present value of the amount the plaintiff"

6. Page 5, line 22.

Following: "IS"

Insert: "thereafter"

7. Page 5, lines 23 and 24.

Following: "FORCE" on line 23

Strike: remainder of line 23 through

"PAYMENT" on line 24

Insert: "for the period for which any reduction of an award is
made pursuant to subsection (3)"